83-176

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

THOMAS HERRMANN, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATE SUPREME COURT
FROM THE COURT OF APPEALS
OF THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

THOMAS HERRMANN, Petitioner[1]

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO

THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

THOMAS HERRMANN, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled case on June 16, 1983.

OPINIONS BELOW

The memorandum opinion of Hon. Spencer Williams , Judge of the District Court; the opinion of the Court of Appeals, and the concurring

1/ Co-defendants and appellants on consolidated appeal were JAMES EAGON and GEORGE ENNIS, the later who concurrently petitions this Court and in whose petition this petitioner joins.

opinion of Boochever, Circuit Judge, are set forth at Appendix A. The judgment of the District Court and order of the Court of Appeals denying rehearing are set forth at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was issued on November 22, 1982 (Appendix A) and thereafter a petition for rehearing was made and denied June 3, 1983 (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether a boarding by the Coast Guard in territorial waters under 14 USC §89(a) absent a reasonable suspicion of violation of law is reasonable under the Fourth Amendment and whether the law, in this respect, should vary according to whether the boarding is at least partly motivated by a valid administrative purpose or whether its purpose is entirely to discover a violation of the criminal law.
2. Whether the Court of Appeals, by allowing

a conviction to stand based on insufficient evidence has thereby so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court, as to call for an exercise of this Court's power of supervision.

3. Whether the Court of Appeals by failing to rule on several issues on appeal has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATUTE INVOLVED

The statute involved is 14 USC §89 set forth in Appendix C to which reference is made.

STATEMENT OF THE CASE

This is a criminal action brought by the United States against petitioner for importation and possession of a controlled substance, marijuana. The District Court's jurisdiction was predicated upon 18 USC §3231 and the jurisdiction of the Court of Appeal predicated upon 28 USC §1291. The parties in this matter stipulated to the following facts and the factual basis for all proceedings in District Court were pursuant to

stipulation. On 12-18-80 at 10:00 PM, Coast Guard vessel 41367 was on patrol in Monterey Bay, California At the time of patrol it was operating exclusively under the provisions of an "operating order" (oporder) code named "Merry Jane"[2] under which the vessel and its crew were to conduct random harbor blockades of Monterey Bay because of the fact that the holiday season would bring "an increase in smuggling activities" and; in so doing, to to board all inbound vessels less than 200 feet in length to check documentation with verification of the main beam number if safety boardings were not made (see Appendix D). There were no other guidelines in force to determine which boats the 41367 should stop and board. On the evening in question the 41367 was under the command of Chief Petty Officer David Emerson Wickstrom who was the only person on board empowered to make decisions to board other vessels and who had reviewed, but never operated under a similar set of, orders. While underway on the bay in search of a larger Coast

2/ stipulated to be the slang term for marijuana

Guard vessel, the 41367 sighted a large contact on radar and observed a smaller contact appear to leave the large contact. Visual contact was then made with the smaller contact which was a small motor boat. The 41367, which was then running without lights, under radio silence, and at a high rate of speed, then visually sighted the S/V REVERIE, a sailing vessel, which was stationary at first sighting about one mile offshore and which shortly thereafter activated its running lights (which was standard operating procedure according to Wickstrom) and began moving slowly toward shore. Wickstrom observed that the fenders were over the side and that there were three people on deck. The 41367 pulled alongside and directed a spotlight at the REVERIE which illuminated the entire area. Wickstrom and the three people on the REVERIE engaged in casual conversation in which Wickstrom learned that the REVERIE had been experiencing clutch trouble which had just been fixed and that the vessel was now headed a hundred miles or

south, down the coast. Wickstrom made a decision to board the REVERIE as soon as he sighted the vessel. The REVERIE was hailed to "heave to and prepare to be boarded" and within five minutes after first visual sighting Wickstrom and an assistant, armed with side-arms, were aboard the REVERIE with another seaman on the bow of the 41367 holding a riot shotgun and facing the REVERIE. As the decks of the vessels were within inches of each other, the boarding was "ship to ship". Wickstrom testified that at no time between the radar sighting and observation onboard the REVERIE of what he thought might be contraband did he think the REVERIE was stolen, that any customs violation was occuring, that it was carrying any contraband, that a fisheries violation was occuring, that the crew was armed and dangerous, or that any punishable offenses , illegality, or violations of law or statute were occuring aboard the REVERIE. He was a little <u>suspicious</u> of some illegal activity but when questioned"what illegal activity were you suspicious of" he replied "I couldn't say".

In fact, the only reason he boarded the REVERIE was that he felt that, under the operations order, he had no choice but to board. He stated that he boarded to make a documentations inspection. After boarding between one and five minutes were spent talking to the crew and examining documents. Then, as Wickstrom was standing over an open hatch, he looked down and observed "bales (and) vegetable sprinklings" that he thought were contraband. A search of the REVERIE was then made resulting in the observation of a number of bales. The vessel was then towed in Monterey harbor where DEA agents made a thorough search discovering marijuana in the bales, three passports of the defendants, a document written in Spainish, and the ownership documents for the vessel which showed the vessel owned by a third party. At no time was a search warrant obtained, even though it was admitted that Wickstrom could have obtained a telephonic warrant or required the REVERIE to wait for a warrant or accompany it into the harbor to await a warrant; and even though the REVERIE could have been

secured to allow a warrant to be obtained after it was in the harbor.

An indictment was filed against petitioner charging him with importation and possession for sale of a controlled substance; and conspiracy to commit those crimes, 21 USC §§ 952(a), 963, 841(a)(1) and 846. Petitioner moved to suppress the evidence, to wit, the observations made in the Bay and the subsequent physical seizures made in the harbor, which motion was denied. Thereafter, petitioner submitted the case for trial to the court on stipulated facts, renewing his objections to the evidence. No direct evidence was introduced that petitioner or any of his co-defendants were ever physically present on the REVERIE by name or description. The only evidence possibly linking petitioner to the vessel on the evening of the arrest was a passport seized from the REVERIE during the warrantless search in the harbor. Another document was seized in the harbor, however, which showed the master and owner of the

vessel to be two persons other than petitioner and his co-defendants. No evidence was offered that petitioner, or any co-defendant, was in physical possession of any marijuana. Based on this evidence, petitioner was found guilty on each count charged.

Following filing of notices of appeal by petitioner and all co-defendants, the case was consolidated for appeal. Petitioner contended, on appeal, that the evidence had been erroneously admitted because, under the provisions of the oporder, the boarding was a search for fruits of a crime which lacked a warrant or probable cause; and because, even if judged by standards applicable to administrative searches, the boarding was defective due to lack of an administrative warrant or reasonable suspicion of an administrative violation. On these issues the Court of Appeals failed to find on the issue of whether an administrative warrant was required: as to the other issues, it found that the boarding was an administrative search

justified because it had been conducted pursuant to an administrative plan which removed discretion from the officer in the field. The "plan" cited was the oporder. The Court of Appeals, in so holding, relied heavily on a 9th Circuit decision, United States v. Piner, 608 F.2d 358 (1979) which, in turn, relied almost exclusively on Delaware v. Prouse, 440 U.S. 648 (1978).

Petitioner also argued that the evidence was erroneously admitted because the search in the harbor had been conducted without a warrant. The Court of Appeals did not even comment on this contention, although it affected the bulk of the evidence, besides the observations made in the bay.

Lastly, petitioner argued that the conviction should be reversed because it was based on insufficient evidence, as no evidence that petitioner was present at the time the REVERIE was stopped and boarded was ever presented. The Court of Appeals refused to consider this issue, as well, citing petitioner's failure to

raise it in the trial court (by way of a motion for judgment of acquittal).

On November 22, 1982, the Court of Appeals issued its opinion affirming the conviction (Appendix A) and thereafter a petition for rehearing was made and denied on June 3, 1983 (Appendix B).

PETITIONER JOINS IN THE PETITION OF GEORGE ENNIS

Petitioner joins in the petition for writ of certiorari, if any, filed in forma pauperis by George Ennis in the matter of GEORGE ENNIS vs. UNITED STATES pursuant to Rule 19.4 of the Rules of this Court.

REASONS FOR GRANTING THE WRIT

1.

THE WRIT SHOULD BE GRANTED TO RESOLVE CONFLICTS AMONG THE COURTS OF APPEAL REGARDING BOARDINGS UNDER 14 USC §89 AND TO DETERMINE WHEN SUCH BOARDINGS MAY BE CONSIDERED PRETEXTURAL, THUS DECIDING AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT IN ORDER TO PROVIDE A UNIFORM RULE THROUGHOUT THE MARITIME JURISDICTION OF THE UNITED STATES.

14 USC §89, the statute which provides the

authority for the boarding in this case, allows the Coast Guard to "make inquiries, examinations, inspections" etc. "upon the high seas and waters over which the United States has jurisdicition" and "[f]or such purposes" to "go on board of any vessel" to "address inquiries", "examine the ship's documents", "search the vessel", etc.

On its face, this statute appears to permit boardings at any time for any purpose without any suspicion of any violation of law.

Yet, as has been recognized many times, no act of Congress can authorize a violation of the Constitution, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

The question then becomes whether a boarding under this statute without even a reasonable suspicion of violation of law in territorial waters at nighttime under the provisions of an operating order such as the one in effect in this case can be justified under the Constitution.

This case presents this issue, and a related issue, in the context of a clearly deliniated

set of facts. Certainly, under the evidence, there could be no suggestion that any "reasonable suspicion" of violation of law motivated the boarding in this case.

During its last term, this Court, in United States v. Villamonte-Marquez, ___U.S.___ (Feb. 23, 1983) (No. 81-1350) decided that such a suspicionless boarding would be constitutionally permissible when made by customs officers operating, albeit without an "oporder" such as was in effect in the present case, under 19 USC 1581(a).

19 USC §1581(a) is a "sister" statute of the law in issue here, 14 USC §89, having similar language and origin: and, while there are a number of reasons, not the least among them the effect of the oporder in the present case, why this case is distinguishable from Villamonte-Marquez, as will be demonstrated, herein, the fact remains that the circuits have issued widely disparate rulings on the effect of 19 USC §89 boardings; and it would seem appropriate to bring the circuits into

conformity on this issue as was done with 19 USC §1581, although a different result is urged in the case of the Coast Guard statute. For instance, one need merely compare the approach of the Ninth Circuit (United States v. Piner, 608 F.2d 358, that such boardings are impermissible under Delaware v. Prouse, 440 U.S. 648 (1979), if conducted at night without cause or an acceptable administrative plan) to the Third Circuit (which has suggested that Prouse does not even affect such boardings, United States v. DeManett, 629 F.2d 862 (1980)) to the First Circuit (which requires absolutely no warrant or suspicion of wrongdoing under any cirucmstances, see United States v. Heyes, 653 F.2d 8 (1981)), and so on.

In addition, as mentioned above, this case presents another issue, in addition to the relationship between 14 USC §89 and the Fourth Amendment, that is, while discussed by a great number of cases involving 14 USC §89 boardings, is no where presented as vividly

as by the facts in this case: that is, the issue of the use of 14 USC §89(a) authority in an administrative context as a pretext for investigation of criminal activity. 14 USC §89(a) has traditionally been analyzed under Fourth Amendment principles applying to administrative searches. While there has been some suggestion of criminal law enforcement motivation in a number of cases in various cirucits such as United States v. Arra, 630 F.2d 836 (1st Cir. 1981), United States v. Rubies, 612 F.2d 397 (9th Cir. 1980), and United States v. Harper, 617 F.2d 35 (4th Cir. 1980), a co-existing "administrative purpose" or other justification for boarding has consistently been found in these cases which has neutralized the claim of pretext and argument that the case should be analyzed under Fourth Amendment principles applying to criminal law enforcement. Here, however, the oporder makes it clear that the only reason for the boarding was to discover evidence of smuggling, using administrative reasons as

pretext for boarding for this purpose.

Thus framed, what should the result be of the boarding under the Constitution in this case? The Fourth Amendment secures the right of the people to be protected in their persons, houses, papers and effects against unreasonable searches and seizures. The stop, as in this case, much less the boarding, is a seizure which must be justified under the Fourth Amendment, United States v. Villamonte-Marquez, ___U.S.___ (Feb. 23, 1983) (No. 81-1350), Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

The central inquiry under the Fourth Amendment is the reasonableness in all the circumstances of the particular government invasion of a citizen's personal security, Delware v. Prouse, 440 U.S. 648, 653 (1979). This analysis requires the balancing of governmental needs analyzed 1) in terms of whether the government action is a "sufficiently productive mechanism" and 2) whether "less intrusive alternatives" are available, against the subjective and

objective intrusion on individual interests. In a maritime context, the intrusion should be considered the boarding of the vessel, not the events that occur after the vessel is boarded, see United States v. Raub, 637 F.2d 1205 (9th Cir. 1980). In an administrative inspection context, the fact that the stop was conducted pursuant to an administrative order which removed certain discretion from the boarding officer does not automatically validate the intrusion: it is merely a factor to be considered in applying the Fourth Amendment test.

To allow the boarding of a noncommercial vessel in territorial waters in the night-time without "cause" except the broad justification of 14 USC 89(a) clearly offends the balancing test under the Fourth Amendment: the intrusion, especially when accompanied by prior radio silence, searchlights, the Coast Guard having run without lights prior to the encounter, ship to ship boarding and displayed weapons, is just too great to

justify serving the generalized government need for documentation compliance in such a case absent some indication of a violation of law or regulation. How, then, must such intrusions for administrative purposes be justified?

The Constitution contains a clear preference for warrants in the case of any search or seizure, whether administrative or otherwise: there is no reason, given the circumstances, why an "area" or telephonic warrant could not have been obtained had there been sufficient cause for this boarding, Camara v. Municipal Court, 387 U.S. 523 (1967), Marshall v. Barlow's Inc., 436 U.S. 307 (1978), Michigan v. Tyler, 436 U.S. 499 (1978), Rule 41(a) and (c)(2), Federal Rules of Criminal Procedure (telephonic warrants). The mere absence of an administrative warrant should make this search illegal.

Even if an administrative warrant is, for some reason, excused, there is no showing in the evidence in this case, that the governmental need outweighed the intrusion on individual

interests.

To begin with, the government put on no evidence regarding the absence of less intrusive alternatives or whether the stops and boardings, such as in this case, were "sufficiently productive mechanisms". This element of the balancing test, in a warrantless stop and boarding, is clearly the burden of the government to prove and having failed to do so there is clearly not sufficient evidence to demonstrate justification for a warrantless search and seizure, Florida v. Royer, ___U.S.___ (March 23, 1983) (No. 80-2146).

Further, it is obvious that less intrusive alternatives were available such as limiting the intrusion to a stop and questioning unless some violation was discovered, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), United States v. Brignoni-Ponce, 422 U.S. 873 (1975), Terry v. Ohio, 392 U.S. 1 (1968), handing the documents from one vessel to the other, or limiting the boarding to the daytime.

The Court, however, as mentioned, validated the conviction by its interpretation of Delaware v. Prouse, 440 U.S. 648 (1978) dictum on the basis that the boarding was conducted pursuant to a "administrative plan" which "removed discretion" of the officer in the field. Yet it is obvious that such a removal of discretion cannot ipso facto validate a search and that an administrative order, such as the oporder in this case (which is Constitutionally offensive on other grounds, infra) cannot authorize a violation of the Constitution. It cannot, as the Court of Appeals seemed to rule, exause the analysis of the intrusion under the "balancing test" of the Fourth Amendment: the administrative plan, itself, would have to be "reasonable"under this analysis and would have to draft-out "aribtrary" government action which is more the touchstone of validity than "discretion", Michigan v. Tyler, 436 U.S. 499 (1978). Unlike the oporder, a "plan" would have to minimize subjective intrusion. Further, it would

seem that any administrative plan obtained, as it would be, in advance of its execution, could and should be subject to the approval of a judge or magistrate, see Camara v. Municipal Court, 387 U.S. 523 (1967). Lastly, the boarding in this case might be characterized as random and discretionary in any event and thus outside of the Prouse dictum when one realizes that the oporder compels "random" blockades by its terms and allows the group commander "discretion" to choose dates and locations, not to mention that discretion was exercised by boarding the REVERIE and not the "small contact" in this case. Thus even under an administrative plan the issues devolve upon the same balancing test as other Fourth Amendment questions and would seem to fail for the same reason.

Further, it is clear that United States vs. Villamonte-Marquez, ___U.S.___ (Feb.23, 1983) (No. 81-1350) does not answer the issues posed by this case due to numerous distinctions: first, the intrusion in that case was less in that the boarding there was in the daytime

rather than night and no weapons were displayed. Further, the governmental interest in that case was greater in that customs law enforcement, which deals directly with importing and smuggling was involved under 1581(a), rather than safety and documentation compliance under 89(a). Further, in that case the vessel was foreign, increasing the need for immediate supervision; the waters were in proximity to a customs port of entry; the vessel was apparently in a known smuggling area; and less intrusive alternatives, such as handing documents across or mere questioning, did not appear to be available. It should be noted, however, that peititioner regards boarding a vessel as more intrusive than stopping a car and looking in since boarding is more like entering a car and a ship is more like a home than a car.

Yet there is an additional reason, despite 14 USC §89(a) and the Villamonte case, why the boarding of the REVERIE should be considered an illegal search and seizure: when a search

or seizure is conducted with the purpose of discovering evidence to be used in a criminal prosecution, and nothing else, its "reasonableness" should be judged by standards applicable to criminal investigations, that is, probable cause. There appears to be much confusion among the circuits as to the deliniation between administrative and criminal investigations in terms of when an ostensibly administrative inspection should be considered "pretextural". Some of the cases involve customs searches where the much stronger government need validates the search as long as there is any legitimate customs basis; others involve investigations on the high seas where, for a variety of reasons, governmental need has also been considered greater and automatically validating regardless of motivation; and others, more on point, involve cases where the court has found a "dual purpose" and held that as long as there was some valid administrative purpose and motivation that the search will be allowed. The case of United States v. Arra, 630 U.S.

836 (1st Cir. 1981), cited in the Villamonte decision is a good illustration of this type of case where a strong administrative purpose motivated by false claims of nationality from the master, the lack of a flag, and the painting over of the hailing port justified a document check on the high seas despite a dual motivation of finding contraband. But this case did not stand for the proposition that searches conducted as administrative inspections could not be found pretextural: in fact, the case strongly criticized pretext searches citing the Ninth Circuit case of Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961) which authorized a factual examination of a search to discover its "dominant purpose". Where the purpose of a boarding is demonstrably to find the fruits of a criminal enterprise (see oporder references to "smuggling" and "merry jane"), standards governing such searches must be applied, Michigan v. Tyler, 436 U.S. 499, 508 (1978), Camara v. Municipal Court, 387 U.S. 523 (1967), Abel v. United States, 362 U.S. 217, 230 (1960), Sorrells v. United States, 287

435 (1932) and search warrants must be obtained, Coolidge v. New Hampshire, 403 U.S. 443 (1971) or, where excused (which, unlike automobile cases, South Dakota v. Opperman, 428 U.S. 364 (1976) would not apply here since vessels, unlike cars, are neither as mobile nor as subject to a reduced expectation of privacy, since they frequently serve as "home to a sailor at sea"), probable cause must be demonstrated: in the present case, Wickstrom's vague suspicions, which he could not articulate, do not rise to the level of probable cause, Sibron v. New York, 392 U.S. 40 (1968), Beck v. Ohio, 379 U.S. 89 (1964), Henry v. United States, 361 U.S. 98 (1959).

Thus the search cannot be justified under administrative or criminal Fourth Amendment standards and, this being the case, the evidence seized thereby must be excluded, Mapp v. Ohio, 367 U.S. 643 (1961).

2.

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO PREVENT THE COURT OF APPEALS FROM SANCTIONING THE CONVICTION BASED UPON CLEARLY INSUFFICIENT EVIDENCE.

Even under Ninth Circuit standards, the conspiracy counts required proof of an agreement rather than proof of mere casual association with conspirators, United States v. Cloughessy, 572 U.S. 190 (9th Cir. 1977); the importation charge required proof that material was brought into the United States, 21 USC §951(a); and possession required proof of dominion and control, United States v. White 463 F.2d 18. Without proof that petitioner was present on the REVERIE when it was boarded and seized, this proof fails under even the extremely liberal test of sufficiency, Jackson v. Virginia, 443 U.S. 307 (1979), accord United States v. Federico, 658 F.2d 1337 (9thCir. 1981). The most the evidence in this case shows is that petitioner might have been in Costa Rica one month before the search with no evidence of any marijuana being involved at that time, due to entries in his passport seized in the warrantless search in the harbor. Equally strong evidence suggests the culpability of third parties: that is, the ownership and master's papers showing the names of persons

other than defendants. But the Court of Appeals refused to consider the sufficiency of evidence because the issue had not been raised below by a motion for acquittal. Although the Ninth Circuit seems to apply this rule, other circuits do not: for example, in the Fifth Circuit it has been held that

> [T]here can be little or no need for a formal acquittal motion for judgment of acquittal in a criminal case tried to a court without a jury upon the defendant's plea of not guilty. The plea of not guilty asks the court for a motion of acquittal and a motion to the same end is not necessary

Hall v. United States, 286 F.2d 676, 677 (5th Cir. 1961). Further, even the cases cited in support of this rule in the Ninth Cirucit do so only by way of dictum because in every one of those cases the court has actually gone on to find on the issue of sufficiency before stating the procedural rule. For example, in Lucas v. United States, 325 F.2d 867, 868 (9th Cir. 1963) the Court applied the procedural rule and held that the case did not require the application of Rule 52b of the Federal Rules

of Criminal Procedure because recourse to the transcript showed guilt beyond a reasonable doubt. The reason for this seemingly inconsistent analysis is that to allow a conviction to stand, as in this case, on insufficient evidence constitutes a miscarraige of justice that undermines the integrity and reputation of the judicial process under Rule 52B. In this case this Court should exercise its supervisory power to prevent such a result from being sanctioned.

3.

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO PREVENT A DEPARTURE BY THE COURT OF APPEALS FROM ACCEPTED AND USUAL JUDICIAL PROCEEDINGS BY FAILING TO RULE ON ISSUES PRESENTED ON APPEAL.

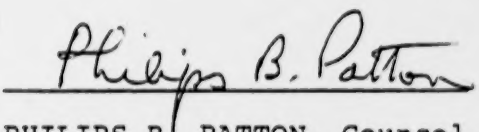
It should be the policy of the Court to require that opinions of the Courts of Appeal finally determine all issues presented to them that are not moot (see fn. 2. in United States v. Villamonte-Marquez, ___U.S.___ (Feb. 23, 1983) (No. 81-1350) and dissent of Justice Brennan). In the present case, two issues were

presented to the Court of Appeals that were not decided. One was whether an administrative warrant would be required for a boarding under Fourth Amendment principles applying to administrative inspections. More siginficant, however, was the issue of whether a warrant was required for the clearly criminal investigation of the REVERIE by the DEA in the harbor which search produced the bulk of the evidence including the passports, without which the government's argument on the sufficiency of evidence is even weaker; and without the whole of which (the samples of contraband, personal effects, etc.) the government's entire case would be in doubt on remand. This issue should have been at least addressed by the Court of Appeals and its failure to do so, so far departs from the ordinary course of judicial proceedings that this Court should exercise it supervisory power to require such consideration, or, alternately, should rule on this issue itself and find the search illegal.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted,



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DATED: July 26, 1983

December 28, 1981
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JAMES EAGON, GEORGE ENNIS, THOMAS HERRMANN, Defendants.	Cr. 81 - 0018 SW MEMORANDUM OF OPINION DENYING MOTION TO SUPPRESS

This case came on for hearing on defendants' motions to suppress certain evidence seized by the Coast Guard in a search of the vessel, Reverie. After careful consideration of the pleadings, briefs, and other evidence, the court denies defendants' motions. The following is a brief statement of the court's reasons.

BACKGROUND

On December 5, 1980, the Commander of the Coast Guard issued an Operation Directive ("operations order") ordering his boats to conduct twelve harbor blockade searches between December 12, 1980 and January 1, 1981. This operation, termed "Operation Merry Jane", was intended to promote blockades during the peak holiday season in an effort to combat increased smuggling activities. The directive required that a minimum of one blockade was to take place between the hours of 9:00 p.m. and 5:00 a.m. at both Morro Bay and Monterey Bay between December 25, 1980 and January 1, 1981. The operations order also contained instructions to (1) board all vessels inbound which are 200 feet or less in length, and (2) conduct documentation checks with verification of main beam number in lieu of safety boardings.

In accordance with the operations

order, Officer David Wickstrom ("Wickstrom") boarded Coast Guard ship 41367 ("41367") on December 18, 1980 to conduct a harbor blockade. Wickstrom, a Coast Guard chief boatswain's mate and Chief Petty Officer, has 14 years service including experience in the detection of narcotics smuggling, primarioy the area of identification of marijuana.

The 41367 left Monterey at about 10:00 p.m. intending to rendezvous with the Coast Guard Cutter Cape Wash ("Cape Wash") near Moss Landing later that evening. At about 10:45 the 41367 arrived at Moss Landing. Unable to locate the Cape Wash, the 41367 proceeded north to Santa Cruz.

Between Monterey and Moss Landing no other vessels had been sighted on radar. The 41367 crew then sighted a large contact that Wickstrom assumed was the Cape Wash because of its size. Wickstrom

felt his assumption was confirmed when a smaller contact left the larger one. Wickstrom initially thought that the smaller contact had been boarded by the Cape Wash.

The smaller contact headed toward Moss Landing and came close enough to the 41367 that the two boats could recognize each other. The smaller vessel then drastically changed course.

The 41367 attempted a rendezvous with what Wickstrom believed was the Cape Wash. Wickstrom later determined, after getting close enough to the larger vessel, that it was not the Cape Wash.

The larger vessel had no lights on, was not moving, and had its fenders hanging over the side as though it had just made contact with another vessel. When visual contact with the larger vessel was made, the lights on the larger vessel, the Reverie, were switched

on, and the vessel began to move slowly shoreward.

Wickstrom suspected that the Reverie might be carrying contraband. Wickstrom and his crew stopped and boarded the Reverie. After conducting a documentation check, they noticed suspicious materials through an open hatch. The materials appeared to be bales with vegetable materials near. Wickstrom checked the materials and determined that it was a large quantity of marijuana.

DISCUSSION

The defendants have raised numerous fourth amendment objections to the boarding and subsequent seizure of the Reverie. Defendants' basic argument is that the initial operation to board constituted a seizure, and the subsequent entry was an illegal search. Defendants argue that the government's intrusion was unreasonable because there was no probable cause, no search warrant, and no valid administrative

search or seizure which would excuse the warrant requirement.

Defendants argue that the case at bar is governed by United States v. Piner, 608 F. 2d 358 (9th Cir. 1979).

In Piner, the Coast Guard was cruising the San Francisco Bay on a routine patrol and decided to board the "Delphene". The Coast Guard later stipulated that the only purpose for stopping and boarding was for "a routine safety inspection," that it was done "on a random basis," and that "there were no suspicious circumstances." Id. at 359.

The Ninth Circuit held, in Piner, that the random stop and boarding of a vessel by the Coast Guard after dark without cause to suspect noncompliance was not justified by the government's need to enforce compliance with safety regulations. Id. at 361. The court stated that a stop and boarding after dard must either be based on cause, requiring, at a minimum, a reasonable and

articulable suspicion of noncompliance, or must be conducted according to administrative standards, carefully drafted to avoid placing sole discretion in the Coast Guard officer. 1/

Here, the surrounding circumstances gave rise to an articulable suspicion of illegal activity on the Reverie. This furnished Wickstrom with the necessary probable cause to stop and board.

When the Reverie was first spotted on radar, it was stationary about one mile off shore. Shortly thereafter, a small boat furtively left the side of the Reverie. The small vessel recognized the 41367 as a Coast Guard vessel immediately and drastically changed course.

The first visual contact the 41367 had with the Reverie revealed that the Reverie had no lights on and was not moving. Moreover, the fenders had been left hanging, a strong indication that the Reverie and the previously sighted small boat had been

in contact. The hanging fenders were also indicative of poor seamanship.

One the 41367 moved close enough to be recognized by the Reverie, the Reverie switched on its lights and began moving shoreward.

Wickstrom testified that, in his training, open hatches, fenders left hanging, and vessels having just left a specific vessel are suspicious activities.

These suspicious circumstances provided sufficiently reasonable cause, especially in the case of a Coast Guard officer with over 14 years experience, to justify the warrantless stop and boarding of the Reverie.

The case at bar is further distinguishable from Piner in that the operations order under which Wickstrom boarded the Reverie conformed to the Piner requirement of carefully drafted administrative standards. The operations order set forth guidelines for conducting harbor blockades.

Unlike Piner, the order instructed Coast Guard officers to board all vessels of 200 feet or less in length and to conduct documentation checks in lieu of safety checks.

In addition to the operations order, the Coast Guard Group Monterey scheduled the required harbor blockades specifically designating the dates, locations, and officers to be involved. The December 18, 1980 horbor blockade was one of those scheduled by the Coast Guard Group Monterey.

The stop of the Reverie was not at the sole discretion of Wickstrom. Every action taken in connection with the stop and boarding was pursuant to the carefully drafted operations order and Coast Guard Group Monterey schedule.

For reasons stated, defendants' motions to suppress are denied.

IT IS SO ORDERED.

Dated: 23 DEC 1981

UNITED STATES DISTRICT COURT JUDGE

FOOTNOTE - U.S.A. v. James Eagon, et al.,

CR 81-0018 SW

1/ Judge Kennedy dissented noting that the Piner rule was contrary to that in most circuits which permit random stops for safety inspections and searches. See United States v. Postal, 589 F.2d 862, 889 (5th Cir. 1979).

FILED
NOV 22 1982
PHILLIP B. WINBERRY
CLERK,U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JAMES EAGON, GEORGE ENNIS, THOMAS HERRMANN, Defendants-Appellants.	NOS. 82-1030, 83-1031 and 82-1083 USDC NOS. 81-018-1(Eagon) 81-018-2(Ennis) and 81-018-3(Herrmann)

O P I N I O N

Appeal from the United States District Court for the Northern District of California Hon. Spencer Williams, Presiding

Argued and Submitted: October 12,1982

Before: MERRILL and BOOCHEVER, Circuit Judges and SMITH*, District Judge.

MERRILL, Circuit Judge:

Following a stipulated facts trial, appellants were found guilty of four counts of drug offenses in violation of 21 U.S.C. §§ 846, 941(a)(1), 952(a)

and 963. On this appeal they challenge an order denying their motion to suppress marijuana and certain documents seized as a result of a warrantless search and the introduction of those items into evidence. At issue is the right of the Coast Guard without warrant to board a vessel at night for safety and document inspection, pursuant to an administrative plan, without founded suspicion of a violation of regulations.

I.

On December 5, 1980 an operations order was issued by the Coast Guard Commander of the Twelfth Coast Guard District which set up a schedule of harbor blockades designating the dates, locations and officers to be involved. The order noted that "smuggling activity increases during the holiday season" and required that enforcement patrols be conducted looking to enforcement of document and safety regulations, apparently pursuant

to the Coast Guard regulation on marine document production, 46 C.F.R. § 67.73-1 (1980). The operation's code name was "Merry Jane", a slang term for marijuana.

The Monterey Group was directed to conduct 12 blockades including blockades at Morro Bay and Monterey Bay between December 12, 1980 and January 12, 1981 between the hours of 9:00 p.m. and 5:00 a.m. during which the Coast Guard group was to board all shore-bound vessels 200 feet in length or less. One of the scheduled blockades was set for December 18, 1980 with Chief Petty Officer David Wickstrom named as primary boarding officer in command of Coast Guard Vessel 41367, a 41 foot Coast Guard patrol boat with a four-man crew.

At about 10:45 p.m. on December 18, Wickstrom and the 41367 proceeded to Moss Landing on the California Coast to rendezvous with another Coast Guard vessel, the Cape Wash. Wickstrom failed to locate

it and headed north. Proceeding towards Santa Cruz, the crew noticed on its radar a "large contact" which Wickstrom assumed to be the Cape Wash. The radar then showed a smaller contact or "blip" leaving the larger one, which Wickstrom assumed was a smaller vessel which had been boarded by the Cape Wash. The 41367 soon sighted the smaller craft which then changed course dramatically. The 41367 continued toward the larger vessel and discovered that it was not the Cape Wash but a sailing vessel, the Reverie. When first sighted its lights were not turned on and it was sationary, but as 41367 approached the Reverie turned on its lights and began to move shoreward. The 41367 manuevered alongside the Reverie. Wickstrom noted that its fenders were hanging over the side and that its hatches were open. The crews of the two vessels engaged in some casual conversation in which one of the three members of the

Reverie crew indicated that they were having some clutch problems and were heading for Morro Bay. The 41367's coxswain then directed the Reverie to "heave to and prepare to be boarded." Wickstrom testified that his only purpose in boarding was to verify the vessel's compliance with safety and document regulations pursuant to the operations order.[1/]

After boarding, Wickstrom could see through an open hatch several bales wrapped in burlap with vegetable matter portruding. He then summon the Cape Wash and upon its arrival the Reverie crew was taken aboard. The Reverie was towed into Monterey. Coast Guard officers conducted an inspection in the course of which approximately 4,000 pounds of marijuana was found. They also found passports of the three appellants, a receipt for the marijuana, and ownership documents of the Reverie. Appellants were placed under arrest.

Before the District Court, appellants

unsuccessfully sought to supprews the marijuana and documents found on the Reverie.

II.

On this appeal, appellants contend that under this court's holding in United States v. Piner, 608 F2d 358 (9th Cir. 1979), the motion to suppress should have been granted because a warrantless boarding and search of a vessel by the Coast Guard after dark constitutes a violation of the Fourth Amendment in absence of probable cause to suppose a violation of law. We agree with the District Court that Piner does not apply.

Piner involved a random stop of a pleasure vessel at night in San Francisco Bay. The sole purpose had been to ascertain and discourage noncompliance with safety regulations. There was nothing about the stopped vessel to suggest noncompliance.

It was the random character of the Piner stop that most concerned us. In Delaware v. Prouse, 440 U.S. 648, 661

(1979), on which we relied in Piner, the Court had spoken strongly on the subject. The Court htere dealt with random stops of motor vehicles for spot checks of registration and licensing. It stated that without reasonable suspicion of violation "we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." Id. (citations omitted).

The Government in Piner strongly defended random spot checks, arguing that the practice served as an alternative to the stopping of all pleasure vessels and that without the random and unexpected character of the stop, much of its

effectiveness as a discouragement of non-compliance would be lost. The Government asserted that:

> [R]andom stops are the only practicable means of ascertaining pleasure craft compliance with safety regulations, * * * * [W]ithout authority to conduct random stops the congressional purpose of maritime safety will, in the case of pleasure craft, be frustrated.

608 F.2d at 361.

We noted the usefulness of the random spot check but felt that that usefulness could be accomplished by a less intrusive exercise of the practice. We stated:

> If the purpose of the random stop is to ascertain and discourage noncompliance with safety regulations, we

> see no reason why this purpose cannot sufficiently be accomplished during the daylight hours.

Id. We held:

> A stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer.

Id.

The fact that the stop and boarding in this case was not random but was pursuant to an operations order completely distinguishes Piner. United States v. Watson, 678 F.2d 765, 773 (9th Cir. 1982). Here Wickstrom had no choice under the

order to but to board the Reverie. As in Watson "the stop did not involve an exercise of discretion by an officer in the field but instead was conducted pursuant to an administrative plan." Id. at 773. There was no feasible less instrusive means f complying with the order because it was explicitly directed at this vessel.[2/]

Appellants contend that verification of documents and safety compliance was a pretext for a criminal investigative search. They point to the order's reference to smuggling activities and the name given to the operation. The same contention was advanced and rejected in Watson. There we stated:

> We assume that the administrative plan which led to the stop of the GLOBE TROTTER was motivated partly by suspicion of drug smuggling. However, the stop and search

had an independent administrative justification, and did not exceed in scope what was permissible under that administrative justification. Therefore, we need not consider any criminal enforcement interest the Coast Guard may have had.

Id at 771. To the same effect is United States v. Arra, 630 F.2d 836 (1st Cir. 1980), where the court stated:

> . . . We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbedding them in the case of suspected smugglers. 3/

Id. at 846.

III.

For the first time on appeal, appellants contend that the record does

not support conviction since the stipulation of facts does not explicitly state that the three appellants constituted the Reverie's crew and were present on board when the vessel was boarded. The appellants made no objection to the sufficiency of the evidence below and this contention will not be entertained here. United States v. Veon, 474 F.2d 1, 3 (9th Cir. 1973); United States v. Perdue, 469, F.2d 1195, 1203 (9th Cir. 1972).

JUDGMENT AFFIRMED.

FOOTNOTES

* Honorable Russell E. Smith, Senior District Judge, United States District Court for the District of Montana, sitting by designation.

1/ Wickstrom noted several suspicious circumstances suggesting illegal activity aboard the Reverie: it initially was stationary and unlighted, but began to move shoreward and turned on its lights soon after the sighting; its fenders were over the side; its hatches were left open; and a smaller vessel which had just left the Reverie suddenly changed course. Because we hold that the search was conducted under administrative standards which removed Wickstrom's discretion in deciding whether to search, however, we need not decide whether these suspicious circumstances constituted "a reasonable and articulable suspicion of noncompliance. . ."

United States v. Piner, 608 F.2d 358, 361 (9th Cir. 1979).

2/ We note that in most maritime cases it would not be feasible to establish a less intrusive means by use of checkpoints such as those used for stops of motor vehicles. Although we discuss motor vehicle stops, by way of analogy, our discussion is not intended to comment on the legality of roving road stops.

3/ We may also note, as administrative justification for the order in our case, that an increase in the presence of non-complying vessels may well follow from an increase in smuggling, because a vessel engaged in smuggling would seem a better than random choice for noncompliance.

OPINION FILED: NOVEMBER 22, 1982

FILED
APR 12 1983
PHILLIP B. WINBERRY
CLERK,U.S. COURT OF
APPEALS

United States v. Eagon, Nos. 82-1030,82-1083 & 82-1031

BOOCHEVER, Circuit Judge, concurring:

I believe that Judge Merrill's opinion is in accord with our decisions in United States v. Piner, 608 F.2d 358 (1979), and United States v. Watson, 678 F.2d 765 (9th Cir.), cert. denied, 51 U.S.L.W. 3419 (1982). In Piner, we concluded that a stop after dark must be for cause and added the dictum that the boarding "must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." 608 F.2d at 361. Here, we are confronted with an administrative order removing discretion.

It is contended that the document inspection might be considered a pretext, as one of the purposes of the administrative order as indicated by its code name of "Merry Jane" was an attempt to interdict the traffic of marijuana into the United States. That contention has been answered by Watson, which holds that even if a purpose of the boarding is to stop smuggling it is permissible if the stop and search had an "independent administrative justification, and did not exceed in scope waht was permissible under that administrative justification." 678 F.2d at 761.

We should therefor look to the scope of the boarding activity under the particular circumstances involved. Those living on their boats have a greater expectation of privacy at night. See United States v. Piner, 608 F.2d 358 (9th Cir. 1979). The boarding in this case, however, involved no invasion of sleeping quarters. Wickstrom,

in charge of the boarding party of two, testified that the only purpose of the boarding was to verify the vessel's compliance with safety and document regulations. Once aboard, the officers did not appreciable move from their positions on deck. They asked the master to retrieve the documentation papers from the cabin and did not enter it themselves. The marijuana which was seized was seen in plain view from the officers' positions above deck. The boarding, itself, involved no intrusion into the living quarters of the Reverie crew.

As was stated in United States v. Steifel, 665 F.2d 414 (2d Cir. 1981), there is

> . . . no basis for denying the government the use of investigatory stops at sea in the fact that many vessels include living quarters for their owners or their crew. While one has a more legitimate expectation of privacy in one's living quarters than in other areas, this expectation has greater relevance to the scope of a search than to the intrusiveness of a stop.

665 F.2d at 423.

I would confine our holding to the facts of this case, leaving for another day a decision as to whether a more intrusive search could be performed at night.

I also concur in the result for another reason. The facts justifying the stop are adequately summarized in footnote 1 of the opinion. Under those circumstances I believe that the boarding was justified under Terry v. Ohio, 392 U.S. 1 (1968), as based on reasonable suspicion.

APPENDIX B: DISTRICT COURT JUDGMENT AND ORDER RE REHEARING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

United States of America vs.

Defendant - THOMAS HERRMANN, Docket No.
Cr 81-0018 SW
SJ

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date -- Mo. Day Yr. 2 3 82

__ Without Counsel — In San Jose, CA However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

XX With Counsel — BARNEY EDLERS, ESQ. (Name of Counsel)

___ Guilty, and the court being satisfied that there is a factual basis for the plea. — ___Nolo Contendere XXNot Guilty

There being a finding/~~verdict~~ of ___ Not Guilty. Defendant is discharged.

XX Guilty.

Defendant has been convicted as charged of the offense(s) of violation of Title 21 U.S.C., Sections 952(a); 963; 841(a); 846 - Importation of a Controlled Substance; Conspiracy to Import a Controlled Substance; Possession with Intent to

Distribute a Controlled Substance; Conspiracy to Possess with Intent to Distribute a controlled Substance.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> two (2) years as to each of counts One, Two, Three, and Four; that sentence on said counts shall runn concurrently; that a special period of parole of two years of parole is imposed.

IT IS FURTHER ORDERED that execution of sentence is stayed pending appeal.

ORIGINAL
FILED
FEB 8 1982
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

In addition to the special condition of probabtion imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 2-8-82
By /s/ Pascal C. Rellur

Signed by
__X__ U.S. District Judge

( ) Clerk
( ) Deputy

____ U.S. Magistrate

/s/ Spencer Williams

CC - USM. Prob. AUSA, DEFT. Date 2-8-82

FILED
JUN 3 1983
PHILLIP B. WINBERRY
CLERK,U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JAMES EASON, GEORGE ENNIS, THOMAS HERRMANN, Defendants-Appellants.	)	Nos. 82-1030, 82-1031, and 82-1083 (N.D. California) O R D E R

Before: MERRILL and BOOCHEVER, Circuit Judges, and SMITH*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court was advised of the suggestion for en banc rehearing; a request was made that a vote be taken on the suggestion; and the court determined not to take the case en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Russell E. Smith, Senior District Judge, United States District Court for the District of Montant, sitting by designation.

APPENDIX C: STATUTE INVOLVED

14 USC § 89 provides:

(a) The Coast Guard may make inquires examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and supression of violations of the laws of the United States. For such purposes, commisioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise , or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the

particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

Commander (0)
Twelfth Coast
Guard District
630 Sansome Street
San Francisco, CA
94126

16232
5 December 1980

From: Commander, Twelfth Coast Guard District
To: Commander, Coast Guard Group Monterey

Subj: Law Enforcement Patrol, Operation Merry Jane

Ref: (a) COMPACAREA OPORD 201-80 Annex J

1. Past intelligence indicates smuggling activity increases during the holiday season. It is anticipated and recent intelligence indicates that this holiday season will not be an exception.

2. Conduct general law enforcement patrol in accordance with reference (a) modified as follows:

a. Patrol Areas:

(1) Conduct a total of twelve random harbor blockades of your area to include Morro Bay and Monterey Bay from 12 December 1980 to 12 January 1981 between the hours of 2100 and 0500, utilizing WPB's and/or patrol boats, as you deem appropriate.

(2) Dates and locations are left to the discretion of Group Commander.

(3) A minimum of one blockade is to be conducted at each location between 25 December 1980 and 1 January 1981.

b. Communications:

(1) A primary and secondary frequency are to be assigned by Group. All voice traffic is to be kept to a minimum.

c. Reports:

(a) Notify CCGDTWELVE (oil)/(rcc) prior to patrol of date and location harbor block will be initiated by message. Complete sigting reports are required at end of patrol.

(2) Report all suspicious activity to the Group. EPIC checks may be conducted as deemed appropriate through Group.

d. Boarding Instructions:

(1) Board all vessels inbound which are 200 feet or less inlength.

(2) Documentation checks with verification of main beam number may be conducted in lieu of safety boardings.

16232
5 December 1980

Subj: Law Enforcement Patrol, Operation Merry Jane

e. SAR:

(1) SAR response will be directed by the Group.

3. Notify CCGDTWELVE (oil)/(rcc) of adverse weather, mechanical difficulties or other circumstances requiring adjustments to this OPORD.

4. Comments regarding this operation as well as suggestions for improvement of future operations are desired.

/s/ J.A. McDonough, Jr.

J.A. McDONOUGH, Jr.
By direction

Copy to:
COMPACAREA (Pol)
CCGDTWELVE (oil) (rcc)

FOR OFFICIAL USE ONLY

Nos. 83-176 and ~~83-5195~~

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS HERRMANN, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE ENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-176

THOMAS HERRMANN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-5195

GEORGE ENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the warrantless nighttime boarding of their vessel by Coast Guard officers violated their Fourth Amendment rights because the boarding was not based on reasonable suspicion or probable cause. They also argue that the court of appeals should have reached their sufficiency of the evidence claim even though they did not raise it in the trial court.

1. After a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioners were convicted on one count of importing marijuana (21 U.S.C. 952); one count of conspiring to commit that offense (21 U.S.C. 963); one count of possessing marijuana with intent to distribute it (21 U.S.C. 841(a)(1)); and one count of conspiring to do so (21 U.S.C. 846).[1] Petitioner Herrmann was sentenced to four concurrent terms of two years' imprisonment, to be followed by a two-year special parole term. Petitioner Ennis was sentenced to four concurrent terms of three years' imprisonment, all but six months of which were suspended in favor of probation. He also received a two-year special parole term. The court of appeals affirmed (Pet. App. 41-58).[2]

a. The evidence at the suppression hearing showed that on the evening of December 18, 1980, petitioners' sailing vessel, the Reverie, was discovered to be smuggling some 4,000 pounds of marijuana into this country from Costa Rica. Acting pursuant to a recently issued Coast Guard operations order, a Coast Guard vessel approached and boarded the Reverie to check its documentation. In the course of that boarding, petitioners' illicit cargo was discovered.

On December 5, 1980, the Commander of the Twelfth Coast Guard District issued an operations order that established a schedule of harbor blockades. The Coast Guard group in the Monterey, California area was directed to conduct 12 nighttime blockades at Morro Bay and Monterey Bay between December 12, 1980, and January 12, 1981.

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[1]Co-defendant James Eagon was convicted on the same counts with petitioners, and his conviction likewise was affirmed on appeal. He has not petitioned for a writ of certiorari.

[2]References to "Pet. App." are to the appendix to No. 83-176.

During those blockades, the group was to board and check the documentation of all shorebound vessels that were 200 feet or less in length. Pet. App. 32, 42-43.

One blockade was scheduled for the night of December 18. That evening, Chief Petty Officer David Wickstrom was in command of Coast Guard Vessel 41367, a 41-foot patrol boat. At about 10:45 p.m., Wickstrom and his crew attempted to rendezvous with a larger Coast Guard vessel. When they failed to locate that vessel, the 41367 headed north along the California coast toward Santa Cruz. Radar revealed a large vessel that Wickstrom assumed to be the second Coast Guard ship. A second, smaller "blip" then appeared on the radar. The 41367 soon sighted that craft, which sharply altered its course when it neared the Coast Guard boat. Pet. App. 33-34, 43-44. The 41367 then approached the larger vessel and discovered that it was not a Coast Guard ship but rather was the Reverie. The Reverie was stationary; its lights were off; its hatches were open; and fenders were hanging over the side. As the 41367 approached, the Reverie turned on its lights and began to move toward shore. *Id.* at 34-35, 44. The 41367 directed the Reverie to heave to, and Wickstrom boarded to verify the ship's compliance with documentation and safety regulations, as directed by the operations order (*id.* at 45). Once aboard, Wickstrom looked through an open hatch and saw several bales that were wrapped in burlap and appeared to contain marijuana. A later search revealed some 4,000 pounds of marijuana, along with petitioners' passports and a receipt for the illicit cargo (*id.* at 35, 45). Petitioners were then arrested.

b. Prior to trial, petitioners moved to suppress the items discovered as a result of the boarding. Before the district court, and again on appeal, they argued that the boarding violated *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979), because it occurred at night. Both courts below

rejected this claim, distinguishing *Piner* on the ground that the boarding here was not random but rather was made pursuant to an administrative directive (Pet. App. 38-39, 46-51). Judge Boochever concurred and additionally was of the view that the boarding was based on reasonable suspicion of criminal activity (*id.* at 55-58).

2. Petitioners contend (83-176 Pet. 11-25; 83-5195 Pet. 7-11) that the warrantless boarding of their vessel at night, without any founded suspicion of criminal activity, violated their Fourth Amendment rights. However, this Court's decision in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), which approved suspicionless boardings of vessels for documentation inspections, puts to rest petitioners' claims.

In *Villamonte-Marquez*, the Court approved the Customs Service's powers, under 19 U.S.C. 1581(a) and 46 U.S.C. 277, to make suspicionless boardings of vessels in inland waters to check for compliance with documentation laws. There is no reason why the same rule should not apply here: indeed, there is even greater justification for applying it to a boarding of a shorebound vessel in territorial waters. See *Villamonte-Marquez*, slip op. 6 n.4. The fact that the Coast Guard, rather than the Customs Service as in *Villamonte-Marquez*, is involved in this case is also immaterial since the Coast Guard's authority under 14 U.S.C. 89(a) is virtually the same as that accorded Customs officials under 19 U.S.C. 1581(a) and stems from the same source. See *Maul* v. *United States*, 274 U.S. 501, 504-507 (1927); *United States* v. *Demanett*, 629 F.2d 862, 866-867 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); *United States* v. *Freeman*, 579 F.2d 942, 946 (5th Cir. 1978).[3] Nor is it

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[3]We also note that, as both the district court and one judge of the court of appeals found (Pet. App. 37-38, 58), Officer Wickstrom possessed reasonable suspicion for boarding the Reverie. When the Coast Guard patrol boat approached, the Reverie was stationary

significant that the boarding here occurred at night. The statute does not limit boarding authority to daytime, and surreptitious violations of navigation and border laws are, if anything, more likely to occur at night. As the court below recognized (Pet. App. 49-50), there were no less instrusive means available to the Coast Guard, and (while we do not believe this was necessary to sustain its coinstitutionality) the boarding was conducted under an administrative plan that left the Coast Guard officers no discretion as to what boats were to be stopped and boarded. See *United States* v. *Watson*, 678 F.2d 765, 773 (9th Cir.), cert. denied, No. 82-555 (Nov. 29, 1982). Accordingly, further review is unwarranted.[4]

3. Petitioners also argue (83-176 Pet. 25-29; 83-5195 Pet. 7 & n. 1) that there was insufficient evidence to support their convictions.

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and had no lights on, yet its fenders were down and its hatches were open as if it had just rendezvoused with the small craft that the Coast Guard boat had seen. When the patrol boat approached, the Reverie turned on its lights and began to move toward shore. These circumstances were certainly sufficient to lead an experienced officer to suspect that criminal activity was afoot.

[4]Petitioners claim (83-176 Pet. 14-15) that the boarding was illegal because the documentation inspection was a pretext for a criminal investigation. However, *Villamonte-Marquez* rejected the argument that the boarding officers' motivation may undermine an otherwise valid boarding and document check (slip op. 4-5 n.3).

Petitioners also contend (83-176 Pet. 28-29) that the court below should have decided whether an administrative warrant was required for the boarding here and whether a search warrant was required for the subsequent search. But the claim that an administrative warrant is needed in a case such as this was raised in *Villamonte-Marquez* (see 81-1350, Resp. Br. 36-37), and implicitly rejected by the Court. See slip op. 15 n.10 (Brennan, J., dissenting). In addition, the court of appeals implicitly rejected petitioners' claim when it held, under its own precedents, that the carefully drafted administrative standards here were sufficient to remove any improper discretion from the executing officer.

As previously noted, petitioners were arrested aboard the Reverie, which was laden with some 4,000 pounds of marijuana. Also seized from the vessel were a receipt for the illegal cargo and documents showing that petitioners had recently left Costa Rica. In district court, petitioners did not contest the sufficiency of the evidence against them. Instead, after their suppression motions were denied, they agreed to be tried on stipulated facts so that they could preserve their right to appeal their Fourth Amendment claims. In the court of appeals, they argued for the first time that the stipulated facts were insufficient because the stipulation did not "explicitly state that the three appellants constituted the *Reverie's* crew and were present on board when the vessel was boarded" (Pet. App. 52). The court of appeals declined to review petitioners' claim, since they had not raised it before the trial court.

Petitioners renew their objection before this Court, but their argument is insubstantial. First, it is by no means clear that the stipulation fails to establish their presence on the Reverie. For example, the stipulation stated (para. 6) that witnesses from the Coast Guard vessels would testify to their observations during the stop of the reverie. That testimony unquestionably would have identified petitioners and co-defendant Eagon as the members of the boat's three-man crew. Moreover, as the court of appeals held, petitioners' agreement to proceed by stipulation, combined with their failure to raise their present objection in district court, barred them from raising it on appeal. The plain error rule (Fed. R. Crim. P. 52 (b)) "was intended to afford a means for the prompt redress of miscarriages of justice" and applies only where the trial is "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Here,

since there is not the slightest doubt that petitioners were present on the vessel, any defect in the stipulation does not constitute plain error. To recognize a "plain error" in such circumstances would create, not redress, a miscarriage of justice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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